SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 640

FLORENCE J. BAILEY, AS ADMINISTRATRIX OF BERNARD E. BAILEY,

Petitioner,

vs.

CENTRAL VERMONT RAILWAY, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HORACE H. POWERS,
Counsel for Respondent.

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FLORENCE J. BAILEY, AS ADMINISTRATRIX OF BERNARD E. BAILEY,
Petitioner and Appellee Below,

vs.

CENTRAL VERMONT RAILWAY, INC.,
Respondent and Appellant Below.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Stripped of its legal verbiage, the petition for a writ of certiorari is based upon two grounds:

First, that a substantial Federal question has been decided by the Supreme Court of Vermont in a manner prejudicial to the petitioner, and

Second, that the decision of the Supreme Court of Vermont is "probably" in conflict with the decisions of this Honorable Court.

A survey of the Record will demonstrate that neither of these assertions is correct.

I.

There Is No Substantial Federal Question Involved.

This Honorable Court has had occasion many times to declare that it will not exercise its discretionary right to review the decisions of the highest Court of a State unless there is a substantial Federal question involved which is necessary for decision by the State Court.

Erie R. R. Co. v. *Solomon*, 237 U. S. 427.

Indeed, this Court has dismissed appeals for want of jurisdiction if no substantial Federal question appeared which was necessary for the decision.

Smith v. *Washington-Southern Ry. Co.*, 246 U. S. 650.

If there is no substantial and important Federal question involved, or if the decision can be justified without a consideration of such an important Federal question, this Honorable Court has refused to review the decisions of a State Court with consistent regularity.

Zucht v. *King*, 260 U. S. 174;
Slaker v. *O'Connor*, 278 U. S. 188;
Seaboard Airline Ry. v. *Watson*, 287 U. S. 86;
Lynch v. *N. Y. ex Rel. Pierson*, 293 U. S. 52;
Honeyman v. *Hanan*, 300 U. S. 14;
Honeyman v. *Hanan*, 302 U. S. 375.

In *Lynch* v. *N. Y. ex rel. Pierson, supra*, the Chief Justice said at page 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually

decided or that the judgment as rendered could not have been given without deciding it."

In *Honeyman* v. *Hanan*, 300 U. S. 14, the Chief Justice said again at page 18:

"Before we can undertake to review a decision of the Court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest Court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause."

The case at bar was one under a statute known as the Federal Employers Liability Act, but it is admitted in the petition herein that the only question presented was whether or not the respondent was negligent. Neither the Safety Appliance Act, the Boiler Inspection Act or any of the special statutes associated with the Federal Employers Liability Act are involved. Under the decision of the Supreme Court of Vermont, no question concerning assumption of risk or contributory negligence is involved. The Supreme Court of Vermont disposed of the case solely upon the ground that the respondent was not negligent.

This Honorable Court has firmly established the rule that negligence under the Federal Employers Liability Act does not depend upon any Federal statute but depends wholly upon common law principles.

Seaboard Airline Ry. v. *Horton*, 233 U. S. 492;
C. V. Ry. v. *White*, 238 U. S. 507;
Great Northern Ry. v. *Wiles*, 240 U. S. 444;
So. Ry. v. *Gray*, 241 U. S. 333.

In *Southern Railway* v. *Gray, Supra*, the Court said at pages 338-339:

"As the action is under the Federal Employers Liability Act, rights and obligations depend upon it

> and applicable principles of common law as interpreted and applied in Federal Courts, (citing cases)."

This Honorable Court has repeated and reaffirmed the quotation taken from *Southern Railway* v. *Gray* upon so many occasions that it has become firmly imbedded in the Act. Identical quotations may be found in *New Orleans etc. Co.* v. *Harris*, 247 U. S. 367 at page 371, in *Chicago, etc. Co.* v. *Coogan*, 271 U. S. 472 at page 474, and in *C. & O. Ry.* v. *Kuhn*, 284 U. S. 44 at pages 46-47.

Thus the United States Circuit Court of Appeals correctly stated in *Escandon* v. *Pan American Foreign Corporation*, 88 Fed. (2) 276, at page 277:

> "The statute (Federal Employers Liability Act) does not undertake to define negligence but leaves its significance to be determined by the common law as announced by the Federal Courts. Southern Railway Co. *v.* Gray, 241 U. S. 333, 36 S. Ct., 558, 60 L. Ed. 1030."

It thus appears that the negligence which is the basis for the claim in this case has to be decided upon the principles of the common law "as interpreted and applied in Federal Courts". However, since *Erie R. R.* v. *Tompkins*, 304 U. S. 64, it appears that there is no Federal common law but that the common law administered in Federal Courts is the common law of the State where the rights arise.

In view of this, an analysis of the decision of the Supreme Court of Vermont shows that the action is based upon a claim of common law negligence, which the Supreme Court of Vermont is well qualified to administer. It would seem that under the decision of *Erie R. R. Co.* v. *Tompkins, Supra*, the case should be considered upon the common law principles as administered in the Courts of Vermont. Whether this is so or not, it is respectfully submitted that the Supreme Court of Vermont had before it only the ques-

tion of common law negligence, which that Court is entirely competent to decide.

The decision of the Supreme Court of Vermont states:

> "In proceedings under the (Employers Liability) Act, the rights and obligations of the parties depend upon it and the applicable principles of the common law as interpreted and applied in the Federal Courts."

That is an exact quotation from *Southern Railway* v. *Gray, Supra*, and the other cited cases which fortify the *Gray* case. It will thus be seen that whether *Erie R. R. Co.* v. *Tompkins* has the effect stated in this Brief, the Supreme Court of Vermont has applied the common law of negligence in conformity with the mandate of this Honorable Court.

It is respectfully submitted, therefore, that even though the case is one arising under a Federal statute, the precise question involved is not a Federal question of any kind. The question involved does not depend for answer upon any Federal statute, nor upon any Federal regulation. The only question decided by the Supreme Court of Vermont was the question of common law negligence. It is therefore further respectfully submitted that not only is there no substantial Federal question in this case but that there was no Federal question raised nor decided by the Supreme Court of Vermont.

II.

The Decision of the Supreme Court of Vermont Is in Harmony with the Decisions of This Honorable Court.

In the argument that the Supreme Court of Vermont has departed from the decisions of this Court, the petition relies heavily upon *Union Pacific Ry. Co.* v. *Hadley*, 246 U. S. 330. The respondent does not question the force of that decision and admits that in this case the respondent's conduct must

be viewed as a whole on motion for a directed verdict. The Supreme Court of Vermont did just that. It is true that the various grounds of alleged negligence were considered in the charge of the Court below but the decision of the Appellate Court made no attempt to divide or isolate those several charges of negligence. In *Union Pacific* v. *Hadley*, supra, relied upon by the petitioner, Mr. Justice Holmes, in considering the evidence on page 333, analyzed the various charges of negligence, as was done by the Supreme Court of Vermont in this case. That separate consideration of these various elements is but a preliminary research prior to a final observation of the complete case. The record shows in this case case that the trial Judge below and the Appellate Court later considered the complete evidence as a unit.

Furthermore, the Supreme Court of Vermont recognized the controlling character of the decisions of this Honorable Court. As is stated in the petition herein, the Court said:

> "We are here dealing with a Federal statute which supersedes all State laws involving the same matter (citing cases)."

The only evidence which contradicts this unequivocal statement by the Supreme Court is the statement of counsel for the petitioner.

The petitioner relies further on three other decisions of this Court decided many years ago which have no significance upon the question presented here.

Schlemmer v. *Buffalo, Rochester, etc. Ry.*, 205 U. S. 1;
Chicago, etc. Ry. v. *Devine*, 239 U. S. 52;
Seaboard Airline Ry. v. *Renn*, 241 U. S. 290.

These cases relied upon by the petitioner need but passing attention. They represent decisions of this Honorable

Court in the special circumstances there presented. If these three cases had any special application to the case at bar, it can be confidently assumed that the Supreme Court of Vermont investigated them. In dealing with a Federal statute, the Supreme Court of Vermont recognized the controlling character of the decisions of this Honorable Court and cited them freely. No attempt was made by the Supreme Court of Vermont to substitute its own judgment for the judgment of this Honorable Court.

It is therefore respectfully submitted that the Supreme Court of Vermont did not depart from the decisions of this Honorable Court and that the petitioner's statement to the contrary is without merit.

III.

The Case at Bar Was Carefully Considered by the State Court of Vermont.

The case went to the Supreme Court of Vermont in the regular course and was argued at length there by counsel. The Supreme Court of Vermont held the case under consideration for several months, and then, sua sponte, ordered reargument. In October, 1942, the case was reargued at length by counsel on both sides, after which the decision was published. It will thus be seen that the consideration given this case by the State tribunal was both generous and deliberate. The petitioner had not one day in Appellate Court but two. The Supreme Court of Vermont gave the case unusual and careful consideration. As said before, the question involved was not one of a Federal nature but was one of common law negligence, which the State tribunal was perfectly equipped to handle.

In view of the full opportunity presented to counsel by the argument and reargument, and in view of the many

months of consideration given this matter by the highest tribunal of Vermont, it is respectfully submitted that this Court should not exercise its discretion for a review of this case.

IV.

Because there is no Federal question involved, because the Supreme Court of Vermont has recognized the authority of this Honorable Court and because of the careful consideration given this case by the State tribunal, it is respectfully submitted that the petition to proceed in forma pauperis and the petition for a writ of certiorari both should be denied.

Respectfully submitted,

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